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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

126

CA 20789

HARVEY K. JACKSON, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on April 8, 1964.

OPINIONS BELOW

There was no opinion rendered by the United States District Court for the Northern District of Texas, Amarillo Division. The opinion of the United States Court of Appeals for the Fifth Circuit was entered on April 8, 1964, and is not yet reported, but is set forth in the Appendix and made a part hereof.

JURISDICTION

The Judgment of the Circuit Court of Appeals, for the Fifth Circuit, was entered on April 8, 1964, and is attached in Appendix B hereto, affirming a Judgment entered on July 31, 1963, in the United States District Court for the Northern District of Texas, Amarillo Division. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), and Rule 37(B) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

An accused was indicted as a result of events which occurred ten months earlier, and counsel who was retained on June 17, 1963 for defense in trial scheduled for June 24, 1963 requested continuance on June 20, 1963 because of inability to prepare defense in time. This motion was denied on June 24, 1963. On June 25, 1963, upon learning that two material witnesses were unable to appear in court because of illness, counsel again requested a continuance. This was also denied, and accused went to trial two days later without the witnesses. In these circumstances, was trial court in error when it denied the continuances?

In prosecution for interfering with an internal revenue agent while in performance of his duty, and the defense is that accused sought to arrest the agents under Texas law because they were in the act of breaching the public peace, was it not error when the trial court instructed the jury that accused had no such right under the Texas law, where evidence could have been interpreted as showing that the agents were loud and vociferous in such manner as to disturb the persons present?

STATUTES AND RULES INVOLVED

18 U.S.C. §111 provides:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Article 212 of the Texas Code, Crim. Proc. states:

> A peace officer or any other person, may, without warrant, arrest an offender when the offense is committed in his

presence or within his view, if the offense is one classed as a felony, or as an offense against the public peace.

Rule 30, Federal Rules of Criminal Procedure

Instructions—At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On August 24, 1962, two agents of the Internal Revenue Service went to the office of Dr. Harvey K. Jackson, petitioner, located in Amarillo, Texas, during business hours, to collect a disputed assessment. After some discussion in the waiting room and in the presence of petitioner's patients, petitioner advised the Agents that he did not owe the assessment and would not voluntarily pay the assessment. Petitioner inquired of the Agents as to whether or not they were going to file a lien on his property and take his bank account again as they had done in April 1962 for a 1957 assessment. It is uncontroverted that petitioner had sufficient money on deposit in two banks to cover the assessment at the time the Agents went to his office to personaly collect. At this point in the discussion, petitioner testified that Agent Hughes told him (R.p. 175) "I am going to close you up and shut you up where you can't do anything." Accord-

ing to petitioner: "I took that as a threat against me, against my business, and against my right to make a living." Whereupon, petitioner placed the Agents under arrest and called their supervisor to come and get them. When the supervisor of the Agents arrived, and after some discussion, the supervising agent attempted to assult the petitioner, whereupon he was also placed under arrest by the petitioner. At this point petitioner once again called the Revenue office and requested that Agent LeRoy Parramore come to his office and take the others away. In due time Revenue Agent Parramore arrived and all three Agents were released to him, whereupon, Agent Parramore excused them and they immediately left. Thereafter, Agent Parramore sat down with the petitioner and talked things over. This incident resulted in an indictment being returned against the petitioner some nine months later on May 13, 1963.

Petitioner was notified on June 1, 1963, by letter from the United States Attorney's office that his case would be set for trial on June 24, 1963. Petitioner retained counsel on June 17, 1963, and on June 20, 1963 the latter filed a Motion for additional time to prepare petitioner's defense. The Motion was denied on June 24, 1963. On June 25, 1963, petitioner's counsel filed a Motion for Continuance based on the inability of two subpoenaed material witnesses to attend Court because of illness. Both witnesses were present during the entire incident involving the Agents and the petitioner, and knew facts critical to petitioner's case. This Motion for Continuance was denied on June 26, 1963. On June 27, 1963, trial was begun, and on June 28, 1963, a verdict of "guilty" was returned by a jury. Petitioner's principal ground of defense was that under Texas law he had the right under the circumstances to place the agents under arrest. However, over petitioner's objection, the Court instructed the jury as follows: "In respect to the defendant's claim that he only used the pistol to put the government agents under arrest, you are instructed that the defendant had no lawful right to make any such arrest under the

circumstances shown in this record." On July 31, 1963, the petitioner was sentenced to imprisonment for 18 months, the first six (6) months of said confinement to be in a jail-type facility, and the execution of the remainder of said imprisonment suspended and as to such remainder of the confinement specified, placed on probation for two years and fined $500.00. Petitnoner's Motion for New Trial was overruled. The case was appealed to the United States Circuit Court of Appeals for the Fifth Circuit which affirmed the Judgment of the District Court on April 8, 1964.

REASON FOR GRANTING WRIT

The petitioner asserts that a writ of certiorari should be granted in this case under subdivision 1(b) of Rule 19 of this Court because the United States Court of Appeals for the Fifth Circuit has rendered a decision which sanctions such a departure from the accepted and usual course of judicial proceedings by the trial court as to call for an exercise of this court's power of supervision.

ARGUMENT I

1. The Trial Court's refusal to grant petitioner's Motion for Continuance based upon the premise of inadequate time to prepare his defense, and also its refusal to grant petitioner's Motion for Continuance based upon the premise of material witnesses being ill and unable to attend Court, resulted in a denial of due process, and also a denial of petitioner's right to effective assistance of counsel.

The incident leading to petitioner's indictment occurred in a medical doctor's waiting-room full of patients. Since ten months had elapsed since the incident it was necessary to consult old appointment books and receipt books in order to find the names of potential witnesses, and additional time was necessary for locating and interviewing such witnesses. Petitioner's counsel was hired on June 17, 1963, and although working diligently day and night, coun-

sel realized, on June 20, that there would not be adequate time to prepare petitioner's defense since it was impossible to contact all of the witnesses and interview them by the trial date, and this was stated in the Motion.

The Motion presented by petitioner's counsel states clearly and concisely that both witnesses who were ill and unable to attend Court were present and witnessed the statements and behavior of all parties who participated in the incident, and such testimony was material to petitioner's defense. Any delay by granting the Motion would not have resulted in any prejudice to the United States Government's case against petitioner. Taking into consideration the complexity of this case, under the due process clause of the Constitution of the United States, petitioner should have been given the right to present all material witnesses and relevant evidence available to him, in order that the proper administration of justice might be accomplished.

ARGUMENT II

2. The Trial Court erred in giving an instruction which took from the jury the principal issue of fact bearing on the defense, and which in fact directed a verdict of guilty, even though there was sufficient evidence to support petitioner's defense as a jury question under Texas law. This constituted a violation of due process of law. In view of this Texas law, we should look at a portion of petitioner's testimony concerning the arrest, which reads as follows:

A. I made that arrest on my property in my own office.

Q. Well, do you think that what they supposedly did was a felony or a breach of the peace?

A. I would call it a breach of the peace; he was threatening to cause trouble.

Q. All right. Do you know what a breach of the peace is under the law?

A. Something that disturbs and causes a disturbance.

Q. Were they causing a disturbance?

A. They did.

Also, a witness (Mrs. Larsen, wife of a patient) testified that the agents and petitioner argued loudly enough to attract her attention from an anteroom in the office.

In addition, there was testimony (from Mrs. Dickerson) that the agents threatened to close the office in tones loud enough for everybody in the office and waiting room to hear.

This testimony reflects a fact situation which shows a disturbance created in petitioner's place of business, of such a nature as was calculated to disturb him and his patients.

The case law concerning breach of the peace, *Haverbekken vs. Hollingsworth*, 250 S.W. 261 (Tex. Ct. of Civ. Ap. 1923), says that a threatened breach of the peace is all that is necessary to authorize an arrest where facts show danger of a breach immediately being committed. Here we have the Appellant, according to his testimony, in a position where he is faced with the present and immediate threats of the Revenue Agents to close the doors of his business and the implication that he and his patients would immediately be thrown out into the street.

The Court, by its instruction, decided the disputed fact issue against the Defendant in reaching its conclusion as to the law of arrest. This fact situation should have been left for the jury to decide with the Court thereby instructing the jury as to the law of arrest. Under the case of *Faye vs. U. S.*, 22 F. 2d 740, (9th Cir. 1927), the Court said that the Court may not withdraw an attempted defense or alibi from the jury or decline to instruct thereon, merely because evidence to support it may be thought inconclusive or even feeble; but if supported by any evidence at all, Defendant is entitled to have the defense go to the jury.

Under federal law, if there is a fact issue as to a particular defense, the accused is entitled to have a jury pass upon whether or not such facts support the defense. Thus the Trial Court's refusal to give the requested instruction

submitted by the petitioner constituted a violation of due process of law. The Appellant's requested charges were presented to the Court in chambers, prior to the Court's oral charge to the jury, and the submission of the same was denied.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20789

HARVEY K. JACKSON

Appellant,

versus

UNITED STATES OF AMERICA

Apellee.

Appeal from the United States District Court for the Northern District of Texas.

(April 8, 1964.)

Before BROWN, MOORE* and GEWIN, Circuit Judges.

PER CURIAM: Appellant was convicted of violating 18 U.S.C. §111[1] after a jury trial in the United States

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*Of the Second Circuit, sitting by designation.

[1] 18 U.S.C. §111 provides:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,00 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

District Court for the Northern District of Texas. On this appeal, appellant contends that the Trial Court erred in (1) refusing to grant his motions for continuance, the first based upon inadequate time to prepare his defense and the second on the unavailability of two witnesses, and (2) failing to instruct the jury as requested.

Appellant was arrested and released on bond on May 15, 1963 and on June 1 was told that his case would be called for trial on June 24. However, appellant did not secure counsel until June 17. His motion for a continuance because of inadequate time to prepare his defense was made on June 20. The trial actually began on June 27. Appellant's motion for continuance due to the temporary unavailability of two witnesses, filed on June 25, did not set out the details of the testimony anticipated but merely stated in conclusory terms that such testimony would be material and not cumulative.

The granting of a continuance rests "within the sound discretion of the trial judge and will not be disturbed unless a clear abuse of discretion exists." *Torres v. United States*, 270 F. 2d 252, 255 (9th Cir. 1959), *cert. denied*, 362 U.S. 92; (1960); see *United States v. Bentvena*, 319 F. 2d 916, 934 (2d Cir. 1963), *cert. denied*, 32 U.S.L.Week 3212 (U.S. Dec. 10, 1963) and cases there cited. Under the circumstances disclosed in this record, the Trial Judge did not abuse his discretion in denying either motion.

The Trial Court instructed the jury that as a matter of law appellant had no right to arrest the federal agents he was charged with assaulting, thus precluding jury consideration of appellant's principal defense. There was no evidence that the agents did any of the acts enumerated in

Texas Penal Code Art. 474,[2] on which appellant relies. See *Heath v. Boyd*, 175 S.W. 2d 214, 216 (Tex. Sup. Ct. 1943). The instruction as given was proper and appellant's contrary request correctly refused.

Affirmed.

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[2] Article 212 of the Texas Code, Crim. Proc. states:

A peace officer or any other person, may, without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an "*offense against the public peace.*" (Emphasis added.) An "offense against the public peace" as here applicable is defined in Article 474 of the Texas Penal Code:

Whoever shall go into or near any public place, or into or near any private house, and shall use loud and vociferous or obscene, vulgar or indecent language, or swear or curse, or yell, or shriek, or expose his or her person to another person of the age of sixteen (16) years or over, or rudely display any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200.00).